UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE OPINIONS AND ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	)	Docket No.: Misc. 13-08

THE UNITED STATES' OPPOSITION TO THE MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, FOR THE RELEASE OF COURT RECORDS

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

Attorneys for the United States of America

The American Civil Liberties Union and two other entities (hereinafter, "ACLU") seek the publication of opinions of this Court addressing "the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act ('FISA'), 50 U.S.C. § 1861 *et seq.*, including but not limited to 50 U.S.C. § 1842." Mot. at 1. The ACLU's motion should be dismissed because the relevant opinions have been subjected to classification review and the unclassified portions released, and there is no basis for the Court to order a new classification review.

ARGUMENT

I. The ACLU's Motion Should Be Dismissed Because Declassified Versions of the Requested Opinions Have Already Been Released.

The ACLU's motion should be dismissed because this Court and the Government have already released declassified versions of the opinions that the Government has determined are responsive to the ACLU's motion after the Government conducted a classification review with the objective to release as much information in the opinions as possible consistent with national security. A new classification review would duplicate the result of the thorough review the Government already conducted.

After a review of this Court's opinions, the Government has identified four responsive opinions that address the legal basis for the "bulk collection" of data by the United States Government under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, including but not limited to 50 U.S.C. § 1842. After a classification review conducted by the Executive Branch consistent with Executive Order 13,526 (Dec. 29, 2009), two of the opinions were released by the Executive Branch and two others were published by this Court. They are:

(1) the Court's Opinion (J. Kollar-Kotelly) granting the Government's application seeking the collection of bulk electronic communications metadata pursuant to Section 402 of the Foreign Intelligence Surveillance Act, the Pen Register and Trap and Trace provision. (Released by the Executive Branch on November 18, 2013), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf.

(2) the Court's Opinion (J. Bates) granting the Government's application seeking to re-instate the National Security Agency's bulk electronic communications metadata program following the Government's suspension of the program for several months to address compliance issues identified by the Government and brought to the Court's attention. (Released by the Executive Branch on November 18, 2013), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

(3) the Court's Opinion (J. McLaughlin) reauthorizing the collection of bulk telephony metadata under the "business records" provision of the Foreign Intelligence Surveillance Act and re-affirming that the bulk telephony metadata collection is both lawful and constitutional. (Published by this Court on October 18, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-158-memo-131018.pdf.

(4) the Court's Opinion (J. Eagan) reauthorizing the collection of bulk telephony metadata under Section 215 of the USA PATRIOT Act and affirming that the bulk telephony metadata collection is both lawful and constitutional. (Published by this Court on September 17, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

Because the Government has already conducted a thorough classification review of these opinions, there is no basis to require the Government to review them again.

II. The Court Should Not Order the Government to Conduct New Classification Reviews of the Opinions.

A. The ACLU does not have standing to seek declassification.

Although this Court has inherent authority to require a classification review of its own opinions as a matter of discretion, and can order such a review *sua sponte,* that authority should be exercised in a manner that is consistent with FISA and this Court's rules. FISA does not provide third parties with the right to seek disclosure of classified FISC records. *In re Mot. for*

Release of Ct. Records, 526 F. Supp. 2d 484, 491 (Foreign Intel. Surv. Ct. 2007). Under United States Foreign Intelligence Surveillance Court ("FISC") Rule of Procedure 62(a) ("FISC Rule"), only a "party" may move the Court for publication of an opinion.[1] This Court recently concluded that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication." *In re Orders of this Ct. Interpreting Section 215 of the Patriot Act*, Docket No. Misc. 13-02, Opinion and Order, at 11 (Foreign Intel. Surv. Ct. Sept. 13, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-130813.pdf. The ACLU is not a party to any of the proceedings that generated the relevant opinions and, therefore, does not have standing to move for publication of the opinions.

FISC Rule 62(a)'s limitation on who can move for publication of an order, opinion, or other decision is in accord with the fact that a comprehensive statutory regime—the Freedom of Information Act ("FOIA")—governs requests for documents classified by and in the possession of the Executive Branch. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32. As this Court has recognized, although this Court has supervisory power over its own records and could

---

[1] **Rule 62. Release of Court Records**

> **(a) Publication of Opinions.** The judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

FISC Rule of Procedure 62(a).

conduct a review "under the same standards as a district court would in FOIA litigation," "there would be no point in this Court's merely duplicating the judicial review that the ACLU, and anyone else, can obtain by submitting a FOIA request to the Department of Justice for these same records." *Id.* at 496 n.32.

The Court should insist that the ACLU respect, and not through its motion attempt to circumvent, the FOIA process enacted by Congress. Accordingly, the Government submits that the Court should not exercise its inherent discretion to determine whether to order a declassification review in this case. FOIA carefully prescribes a process whereby parties must first seek administrative review of FOIA requests before bringing litigation, and FOIA includes additional exemptions beyond the classification exemptions that would overlap with a declassification review ordered by the FISC. Such duplicative processes therefore raise administrative concerns, and the FISC should resist invitations to serve as an alternative forum for FISC-related matters that can and should be resolved through the FOIA process established by Congress.

B. This Court traditionally does not involve itself with the Executive Branch's classification decisions.

The ACLU seeks an order giving it full access to the opinions or, in the alternative, requiring the Government to justify any redactions to the Court as necessary to prevent a substantial probability of harm to a compelling interest. The ACLU also seeks the right to contest redactions. The ACLU invokes the First Amendment, but the First Amendment does not justify judicial (or ACLU) involvement in Executive Branch classification decisions.

Putting aside the fact that this Court has repeatedly rejected arguments that litigants such as the ACLU have a First Amendment right to access classified FISA court records,[2] the Court does not interfere with the Government's classification process and classification decisions. Under FISC Rule 62(a), the Court is empowered only to "direct the Executive Branch to review the [opinion] and redact it as necessary to ensure that properly classified information is appropriately protected." This limitation on the Court's discretion is consistent with the requirement that, "[i]n all matters, the Court and its staff shall comply with the security measures established pursuant to [Congressional mandate], as well as Executive Order 13526." FISC Rule 3; *see also* FISC Rule 62(b) (mandating that a release of FISC records must be conducted "in conformance with the security measures referenced in Rule 3"). Executive Order 13,526 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," and under that system only certain designated Executive Branch officials can classify or declassify national security information. *See* Executive Order 13,526.

Consistent with the Court's Rules of Procedure, the Court's decisions also make clear that the Court does not involve itself with the Executive Branch's declassification decisions. Indeed, "if the FISC were to assume the role of independently making declassification and

---

[2] *See In re Mot. for Release of Ct. Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007); *In re Mot. for Release of Ct. Records*, Memorandum Opinion, Docket No. Misc. 07-01 (Foreign Intel. Surv. Ct. Feb. 8, 2008), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-us-opposition-130705.pdf (Appendix A to *In re Orders Issued by This Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, The United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records (Foreign Intel. Surv. Ct. July 5, 2013)). In this Court's most recent Opinion and Order involving the ACLU, the Court chose not to "reach[] the merits of the [ACLU's] asserted right of public access under the First Amendment." *See In re Orders of this Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, Opinion and Order, at 17 (Foreign Intel. Surv. Ct. Sept. 13, 2013).

release decisions . . . there would be a real risk of harm to national security interests and ultimately to the FISA process itself." *In re Release*, 526 F. Supp. 2d at 491. "FISC judges do not make classification decisions and are not intended to become national security experts." *Id.* at 495 n.31 (citing H.R. Rep. No. 95-1283, pt. 1, at 25-26 (1978)). And, while FISC judges may have "more expertise in national security matters than a typical district court judge, that expertise [does] not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security." *Id.* Thus, this Court has recognized that "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions." *Id.* at 491.[3] This Court recently reiterated that "[i]t is fundamentally the Executive Branch's responsibility to safeguard sensitive national security information." *In re Mot. for Consent to Disclosure of Ct. Records*, Docket No. Misc. 13-01, Opinion and Order, at 6 (Foreign Intel. Surv. Ct. June 12, 2013) (citing *Department of Navy v. Egan*, 484 U.S. 518, 527-29 (1988)), *available at* www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf. Thus, this Court should deny the ACLU's First Amendment classification review request and the ACLU's request to contest any redactions.

For these reasons, the Court should deny the ACLU's request for new classification reviews of the relevant opinions. There is no need for this Court to order new classification reviews of the relevant opinions because the Government recently conducted thorough classification reviews of these opinions and made "public as much information as possible about certain sensitive intelligence collection programs undertaken under the authority of the Foreign Intelligence Surveillance Act (FISA) while being mindful of the need to protect national

[3] This is not to say that Executive Branch classifications are never judicially reviewable. The proper means to obtain such review is through a FOIA request and subsequent action in district court. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32.

security."[4] Release of these documents reflected the Executive Branch's continued commitment to making information about intelligence collection publicly available when appropriate and consistent with the national security of the United States.

CONCLUSION

For the reasons stated above, the ACLU's Motion should be denied.

December 6, 2013

Respectfully submitted,

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

/s/ Nicholas J. Patterson
NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

Attorneys for the United States of America

[4] *DNI Clapper Declassifies Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (FISA), available at* http://icontherecord.tumblr.com/post/60867560465/dni-clapper-declassifies-intelligence-community. Although this statement was made in reference to the two opinions the Government released, the Government also applied the same standard when conducting the classification review of the two opinions published by this Court.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records was served by the Government via Federal Express overnight delivery on this 6th day of December, 2013, addressed to:

Alex Abdo
Brett Max Kaufman
Patrick Toomey
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
aabdo@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
artspitzer@aclu-nca.org

David A. Schulz
Media Freedom and Information Access Clinic
Yale Law School
40 Ashmun Street, 4th Floor
New Haven, CT 06511
david.schulz@yale.edu

Gregory L. Diskant
Benjamin S. Litman
Richard I. Kim
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
blitman@pbwt.com

/s/ Nicholas J. Patterson
Nicholas J. Patterson